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No. 82-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner United Steelworkers of America, AFL-CIO-CLC ("USWA") submits this Reply Memorandum in response to the Brief in Opposition of Respondents Erkins, Denson and Culpepper (hereinafter "Respondents").[1]

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[1] As indicated in our petition, there are two sets of respondents in this case: Elbert Erkins, et al., plaintiffs below, who oppose the petition for certiorari; and Billy Bryan, et al., defendants below, who support the petition. This reply brief is submitted in response to the former group of respondents; for convenience we refer to them simply as "respondents."

Although respondents assert that it was "duplicitous" of USWA to name the individuals who were defendants below as respondents, USWA did so pursuant to Rule 19.6 of the Rules of this Court which states in pertinent part:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court,

1. Respondents go to great lengths (Br. at 1-4) in their Brief to argue that USWA is "not actually a party to this litigation" and hence not a proper petitioner. Respondents are wrong.

As respondents concede (Br. at 3), after the district court granted respondents' *ex parte* motion for leave to file this action, USWA moved to intervene in the district court for the limited purpose of seeking reconsideration of the district court's decision to entertain this action. In that motion, USWA raised the very issues that are raised herein, *viz.* the meaning of the term "member" and the phrase "good cause" in the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). USWA did so because of it had a substantial stake in securing the prompt dismissal of this lawsuit: as explained in the petition (p. 14), this lawsuit threatened to expose USWA to expenses which were unnecessary to achieving the purposes for which § 501 was enacted.

The district court recognized USWA's interest in this regard, and in the first sentence of the first footnote of the opinion that the district court issued in response to USWA's motion for reconsideration, the district court stated, "USW[A] was granted the right to be heard on its plea for reconsideration" (Pet. App. 15a). The district court went on to address and reject respondents' argument that intervention was not proper because USWA

> unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. . . . *All parties other than petitioners shall be respondents*, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition.

Under that rule, of course, it is not uncommon to find parties named as respondents who were aligned with the petitioner in the lower courts and who support the granting of a writ of certiorari.

was not asserting a claim or a defense, ultimately concluding that "the Court is of the opinion that USW[A] has a right to ask for such reconsideration" (*id.*).

In accordance with the decision of the district court, on the appeal of this case to the Eleventh Circuit USWA was treated as an intervenor-appellee both by respondents and by the court of appeals. In papers they filed in the court of appeals, respondents repeatedly referred to USWA as "[i]ntervenor-appellee, United Steelworkers of America."[2] USWA filed a brief as a party and presented oral argument as a party. And in the caption of its initial opinion (Pet. App. 1a), and of its opinion on rehearing (*id.*, 13a), the court of appeals listed USWA as "Intervenor-Appellee." Thus, respondents' claim that USWA was not a party below and hence is not a proper petitioner in this Court is without merit.

2. With respect to each of the questions of statutory interpretation raised in our petition, respondents contend that the question we raise is not presented by the decision below. According to respondents, the court of appeals did not ascribe any general meaning to the pertinent provisions of the LMRDA, but rather made *ad hoc* determinations—turning exclusively upon the facts of this case—that respondents were "members" and that "good cause" existed for entertaining this action. Thus, respondents contend that the court of appeals based its determination of "membership" "upon all of the factual variables demonstrating membership on this record" (Br. at 8) and that the appellate court likewise found "good cause" for entertaining this action by "consider[ing] all factors" (Br. at 10).

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[2] In their opening brief in the court of appeals, respondents listed USWA in the caption of the case as "Intervenor-Appellee." Respondents did likewise in their Reply Brief. And on two occasions in the court of appeals, when USWA moved to supplement the record, respondents filed memoranda in opposition which repeatedly referred to USWA as "intervenor-appellee."

Significantly, in making these claims respondents do not even cite to—let alone quote from—the decision of the court of appeals. Respondents' omission is understandable, for the opinion below unmistakably rests on interpretations of the statutory provisions—interpretations which, as we showed in our petition, have broad-reaching significance and which are inconsistent with the language, history, and purposes of the Act.

In determining that respondents were "members" within the meaning of § 3(o) of the Act, the court of appeals reasoned as follows:

> [I]t is appropriate when considering the meaning of the words in § 501(b) to look at the definition section of Chapter 11, of which this section is a part.
>
> • • • •
>
> The effect to be given to this definition has been ably described by the Court of Appeals for the Seventh Circuit:
>
> • • • •
>
> > [U]nder section 402(o), one who has met the membership requirements remains a member within the meaning of the Act until one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after "appropriate proceedings" held pursuant to lawful constitutional or bylaw provisions. *See Brennan v. Independent Life Truck Builders Union*, 490 F.2d 213, 217 & n.6 (7th Cir. 1974). [Pet. App. 6a-7a]

Similarly, in finding "good cause" the court of appeals explained:

> The [USWA] . . . claims . . . that an ingredient in the trial court's decision granting such a petition [for leave to file a § 501(b) action] is that there must be a finding that there has been a showing of "good cause." The [USWA] contends that the way it handled the matter instead of filing suit as out-

> lined in the statute itself would have been more beneficial to the Union than to have acted as requested by the members. This, of course, cannot establish a want of good cause, because the language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring such suit. The trial court could not second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. [App. 9a-10a]

Thus, in both instances, the court of appeals made an interpretation of the statutory provision involved. The court interpreted the definition of "member" in § 3(o) temporally to mean that " 'one who has met the membership requirements remains a member within the meaning of the Act until one of two events [withdrawal or suspension after appropriate proceedings] occur." ' And the court interpreted the "good cause" requirement of § 501 (b) to be satisfied automatically if the plaintiffs "have requested that a suit be brought and there is a failure within a reasonable time to bring suit."

As we showed in our petition, each of these holdings warrants review by the Court: the "membership" holding because it erroneously confers "membership" status (with all the rights that entails) on persons who once were, but no longer are, within a union's jurisdiction but who have not formalistically withdrawn or been expelled; and the "good cause" holding because, by ruling irrelevant to the "good cause" determination a union's efforts to recoup diverted funds through means other than litigation, it opens the federal courts to unnecessary § 501(b) actions which will disserve the statutory purpose of full recovery by union treasuries of such funds.[8]

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[8] Respondents assert (Br. at 6) that USWA's decision here to turn respondents' allegations of wrongdoing over to the United States Department of Labor for investigation and for whatever

CONCLUSION

For the foregoing reasons, and those set forth in our Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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action the Department deemed appropriate, and USWA's further decision to make a claim on its "Labor Organization Bond" if the Department found any misappropriation of funds were motivated by a desire to thwart discovery by respondents. The assertion is contrary to the undisputed record evidence. Carl Frankel, the Associate General Counsel of USWA, on whose recommendation this procedure was adopted by USWA, submitted an affidavit which explains at length the reason for USWA's decision in this case (and in two other like cases) to seek a DOL investigation; as explained in our Petition (at 7), USWA so decided in order to secure an impartial determination of whether wrongdoing had occurred and, if so, to enable USWA to recover its losses without the costs of litigation.

Respondents' further assertion (Mem. at 6 n.3) that in the criminal litigation against Bryan, et al., "Steelworkers officials, including accounting and audit officials, appeared as witnesses for Bryan . . . thereby virtually assuring their acquittal" is likewise false; at the criminal trial, only two USWA officials (Thomas Striegel, the assistant to the International Treasurer, and Therman Phillips, the District Director of District 36, the District which encompasses Alabama) testified, and both were called as witnesses for the *prosecution*. *See* Transcript of Trial in *U.S. v. Bryan*, No. CR-81-83-N, at 41, 66.